BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES L. ABRAMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 150,733
JOE CONROY CONTRACTOR, INC.	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal from an Award entered by Administrative Law Judge James R. Ward dated January 18, 1995. The Appeals Board heard argument on June 15, 1995.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth of Lenexa, Kansas.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are hereby adopted by the Appeals Board.

ISSUES

Claimant seeks review of the findings and conclusions by the Administrative Law Judge on the following issues:

1. The claimant's average weekly wage.

2. Nature and extent of disability, specifically the determination of his wage loss for the calculation of his work disability.

Respondent raises the following issues:

1. The nature and extent of claimant's disability.

2. The appropriateness of awarding an interest penalty pursuant to K.S.A. 44-512b for the underpayment of temporary total disability compensation.

3. Whether the Administrative Law Judge exceeded his authority in retroactively approving vocational rehabilitation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing argument and considering the briefs of the parties, the Appeals Board finds as follows:

(1) Average weekly wage. The Administrative Law Judge found claimant's average weekly wage to be $413.95 until July 1, 1991 when respondent discontinued paying a portion of claimant's health insurance. Beginning July 1, 1991, claimant's average weekly wage was found to be $442.82 by including the amount of the employer's fringe benefit contribution. The Administrative Law Judge rejected claimant's testimony that he worked 9 ½ hour days, 6 days per week. The Administrative Law Judge relied upon the wage statement to find unpersuasive claimant's testimony that he usually and regularly worked or was expected to work 57 hours per week. The Administrative Law Judge, therefore, calculated average weekly wage based upon a 40-hour work week and an average of 3.37 hours per week in overtime. Both parties agree that the Administrative Law Judge erred in calculating average overtime. In this case, 26 weeks should not be used to divide the total overtime figure because claimant did not work during two of the 26 weeks next preceding his date of accident. The total overtime reflected on the wage statement should have been divided by 24 weeks. The total overtime claimant worked of 90 hours divided by 24 weeks equals 3.75 hours per week.

The disagreement between the parties concerning average weekly wage primarily concerns the number of hours claimant was expected to work per day and the number of days in his work week. Claimant testified that he was expected to be available to work 6 days per week but that the weather prevented him from actually working 6 days every week. According to claimant, he would have to call in to be allowed off work on Saturdays, just like other work days. He would not know until the day before whether or not he would have to work any given Saturday. In addition, claimant's testimony was that he was expected to be available to work 9 ½ hours a day, weather permitting. The claimant's testimony in this regard is uncontroverted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded, absent a showing that it is untrustworthy. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). The Administrative Law Judge relied upon the wage statement to find claimant's testimony unreliable. However, the wage statement does not reflect what days the claimant may have been unable to work due to weather conditions. The wage statement does show that claimant worked a total of 90 hours of overtime during the 26 week period prior to his accident. Two of those weeks claimant was on vacation. In 6 of the 24 weeks that claimant worked, claimant had 7.5 or more hours of overtime which

could indicate that he worked more than 5 days during those weeks. Also, Memorial Day, Labor Day and the Fourth of July fell within the period encompassed by the wage statement. Thus, a six-day work week would not be reflected during the weeks in which there was a holiday. Thus, out of the 26 weeks, claimant did not work 2 weeks and 3 weeks had holidays, leaving 21 weeks where he could have worked 6 days, weather permitting. The wage statement suggests at least six of those weeks had sufficient overtime hours to indicate the possibility of a six-day work week. This, together with the variable of weather, makes the wage statement alone an insufficient basis for disregarding claimant's testimony. Respondent did not contest claimant's testimony with regard to the number of days claimant was expected to work or the number of hours per day he was expected to be available for work. Therefore, the Appeals Board finds that claimant's average weekly wage should be based on a six-day work week as follows: $9.25 times 9.5 hours per day equals a daily rate of $87.88 times 6 days per week equals gross average straight-time earnings of $527.28 per week. Because claimant never worked over 57 hours in any week, his average weekly overtime earnings of $17.34 is arrived at by multiplying 3.75 hours per week average overtime by the half-time hourly rate of $4.625. After June 30, 1991, fringe benefits of $30.88 would also be included to arrive at claimant's gross average weekly wage. Therefore, the Appeals Board finds claimant's average weekly wage for the period of October 13, 1990, through June 30, 1991, to be $544.62 and $575.50 beginning July 1, 1991. Accordingly, the temporary total disability compensation rate would be based upon the maximum weekly benefit of $278.00 both before and after the discontinuation of fringe benefits.

(2) Nature and extent of disability. The Administrative Law Judge found claimant's functional impairment to be 20 percent to the body as a whole. This finding has not been raised as an issue on appeal and is, therefore, adopted by the Appeals Board. Claimant challenges the Administrative Law Judge's finding of a 25 percent work disability. Although claimant does not take issue with the Administrative Law Judge's finding of a 50 percent loss of access to the labor market, claimant does challenge the Administrative Law Judge's finding of no wage loss. The Administrative Law Judge averaged the 50 percent labor market loss with a 0 percent loss in claimant's ability to earn a comparable wage to arrive at a 25 percent work disability. In so doing, the Administrative Law Judge followed the analysis approved by the Kansas Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1022 (1990) whereby permanent partial disability under K.S.A. 1989 Supp. 44-510e was arrived at by averaging the two prongs of the work disability formula. Specifically, claimant challenges the finding by the Administrative Law Judge that claimant was capable of earning a comparable wage and thus had not lost any of his ability to earn a comparable wage as a result of his work-related injury and the resulting restrictions. Claimant testified at regular hearing that he was to start a job the next day which would pay him $7 per hour. Claimant further testified that he anticipated being able to work 60 hours per work. The Administrative Law Judge found claimant would, therefore, be earning $490 per week assuming 20 hours per week of overtime at time and a half. Claimant argues that, except for those weeks for which temporary total disability compensation was paid, he has a 100 percent wage loss for the period beginning with the date of accident up through the date of the January 31, 1994, regular hearing. According to claimant, wage loss should be determined by comparing the base wage of $7 per hour claimant expected to be earning compared to the $9.25 per hour base wage claimant was earning working for respondent. This would result in a 24 percent loss. However, the Appeals Board believes the proper method of determining claimant's wage loss after his return to work

would be to compare the average weekly wage claimant was earning with respondent to the anticipated average weekly wage claimant testified he had the ability and expected to earn with his new employer. The claimant's actual earnings postaccident and postrehabilitation would be the best measure of his earning ability. Therefore, by comparing claimant's $575.50 gross average weekly wage to his anticipated postaccident average weekly earnings of $490 results in a loss of 15 percent. This combined with the 50 percent labor market loss results in a work disability of 32.5 percent beginning February 1, 1994.

The Appeals Board disagrees that claimant's loss of ability to earn a comparable wage prior to February 1, 1994, was 100 percent. During those weeks, if any, claimant was not temporarily totally disabled or receiving temporary total disability benefits while engaged in retraining or job search pursuant to any vocational rehabilitation plan, claimant retained the ability to earn some wage. Granted his wage-earning ability was less prior to his completion of vocational rehabilitation training. Based upon the testimony of Bud Langston, we find that he retained the ability to earn at least $5.50 per hour or $220 week for a 62 percent wage loss. Clearly, claimant's postaccident vocational training increased his wage-earning ability and thereby decreased his loss of ability to earn a comparable wage. Although it did not return claimant to a comparable wage, it certainly enhanced his employment opportunities. However, claimant's work disability prior to February 1, 1994 becomes a moot issue based upon the award herein of temporary total disability during the period of vocational training.

(3) Interest. The Administrative Law Judge found that "there does not appear to be just cause or excuse for the failure of the employer or insurance carrier to pay the proper amount of temporary total disability compensation to which claimant was entitled." Accordingly, the Administrative Law Judge found pursuant to K.S.A. 1990 Supp. 44-512b "claimant is entitled to interest on this amount, pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto accruing from the date such compensation was due."

The findings of the Appeals Board on the issue of average weekly wage results in an increase in the amount of the underpayment of temporary total disability compensation for the period of October 13, 1990 to June 30, 1991. Whereas the Administrative Law Judge found that claimant should have been paid at the rate of $275.98 per week during this period rather than the $246.67 per week that respondent paid, for a deficit of $29.31 per week, the Appeals Board finding results in a deficit of $31.33 per week for 37.29 weeks or $1,168.30 during this period. However, given the controversy surrounding the calculation of claimant's average weekly wage, we cannot say that there was not just cause or excuse for the employer or insurance carrier not to pay the proper amount of temporary total disability compensation during this period. Nevertheless, we can still say that the finding by the Administrative Law Judge was appropriate. Clearly, claimant was entitled to at least the amount of temporary total disability compensation that the Administrative Law Judge found to be due. Therefore, his award of an interest penalty for the deficit of $29.31 per week for 37.29 weeks is affirmed.

(4) Vocational rehabilitation. The Administrative Law Judge awarded an additional 54.14 weeks of temporary total disability compensation for the period of time claimant was enrolled in a machinist program. That vocational school training was the subject of a vocational rehabilitation plan amendment which was rejected following a hearing. With the

disapproval of the training, vocational rehabilitation was closed. Claimant decided to pursue the training program on his own and was nearing completion of the program at the time of regular hearing when he testified that he had been successful in obtaining employment which was to begin the next day.

Respondent objects to the Administrative Law Judge's award of these additional vocational rehabilitation benefits on several counts. First, respondent contends that the Workers Compensation Act does not confer authority upon an administrative law judge to retroactively approve vocational rehabilitation benefits. Respondent cites K.S.A. 1990 Supp. 44-510g(e)(2) as giving an administrative law judge authority to order vocational rehabilitation at a hearing requested by a party within ten days of the report issued by the vocational rehabilitation administrator. In this case, as the benefits were disapproved, that decision cannot be altered by the Administrative Law Judge in the final award, according to respondent.

Respondent also objects to the additional vocational rehabilitation award on the basis that it violates K.S.A. 1990 Supp. 44-510g(e)(3) wherein vocational rehabilitation services are limited to 36 weeks except in extremely unusual cases and then may only be extended after a hearing and a special order. Respondent argues that since no such hearing was conducted in this case and no such special order was entered, that the additional benefits are not permitted. Furthermore, respondent points out that same statute grants respondent the right to appeal an award of vocational rehabilitation services in excess of 36 weeks, and that right is denied where the award of those services is after the fact.

Finally, respondent points out that the approval of an additional 54.14 weeks of temporary total disability benefits results in claimant receiving in excess of 72 weeks of vocational rehabilitation services when the twenty-plus weeks of job placement services is considered. Again, respondent contends, the Administrative Law Judge was without authority to approve the vocational educational program in excess of 72 weeks of vocational benefits against respondent.

It should be noted first of all that the Administrative Law Judge, in addition to temporary total disability compensation at the rate of $278.00 per week during the period of claimant's schooling, also awarded claimant "the costs of tuition, books and supplies for attending class and any other expenses related to such schooling." Claimant's counsel concedes that respondent should not be required to reimburse claimant for the costs of tuition, books and supplies to the extent those items were covered by a Pell grant claimant received. With regard to temporary total disability compensation, the Appeals Board agrees that vocational rehabilitation benefits should be limited to 76 weeks. The Administrative Law Judge's award of vocational rehabilitation benefits should otherwise be approved. Claimant met the criteria set forth in K.S.A. 1990 Supp. 44-510g(d) and accordingly he ". . . shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages . . . . "

We do not read K.S.A. 1990 Supp. 44-510g(e) to preclude an administrative law judge from awarding vocational rehabilitation benefits in a final award regardless of

whether those benefits are retroactive or prospective. As to respondent's statutory appeal rights and remedies, such are not cut off by the Administrative Law Judge's Award. The fact that claimant has completed the schooling approved by the Administrative Law Judge does not preclude respondent from appealing said order. Therefore, the Appeals Board finds that the Administrative Law Judge did not exceed his authority in awarding the vocational rehabilitation benefits contained in his Award. Furthermore, the benefits awarded appear reasonable and appropriate under the circumstances. Even though the training did not return claimant to "more than a comparable wage to that which he had at the time of his accident" as found by the Administrative Law Judge, the training apparently did return claimant to approximately 85 percent of his pre-injury average weekly wage and will be even closer when claimant becomes eligible for the health insurance benefits at his new employment. This constitutes a substantial improvement in claimant's wage-earning ability over that which he possessed after his injury and prior to the vocational training. Respondent also benefits from the retraining by way of a reduced work disability from that which the claimant would otherwise have, had he not taken the initiative and completed the training. Therefore, except to the extent that the Administrative Law Judge's Award duplicates grant-in-aid benefits claimant received for his schooling, the Administrative Law Judge's award of vocational rehabilitation benefits is affirmed.

The calculation of the award is made difficult due to the fact that the attorneys failed to set out in the record the exact number of weeks claimant was paid medical temporary total disability compensation and the number of weeks claimant was paid vocational rehabilitation during periods of assessments versus vocational rehabilitation temporary total disability compensation during periods of plan implementations. The Administrative Law Judge, in his award, simply lumps together medical and vocational temporary total disability compensation. The Administrative Law Judge's award provides for temporary total disability compensation from October 13, 1990, through February 1, 1994, a period of 172.58 weeks.

The record shows that claimant was injured on October 12, 1990. He was found to have reached maximum medical improvement and was released by the treating physician effective August 22, 1991. This represents a period of 44.86 weeks of medical temporary total disability for which medical temporary total disability compensation would be due. In addition, claimant was in a pain clinic program from January 27, 1992, through February 14, 1992, a period of 2.71 weeks. These two periods combine for a total of 47.57 weeks. However, at the regular hearing, counsel for respondent announced that claimant had been paid a total of $16,832.78 in medical temporary total disability compensation and $15,012.00 in vocational temporary total disability compensation. It was also announced that claimant was paid temporary total disability at the rate of $246.67 for the period of October 13, 1990, through June 30, 1991, (37.29 weeks) and was paid thereafter at the rate of $278.00. We can extrapolate from these figures that claimant was paid a total of 75.03 weeks of medical temporary total disability compensation. Subtracting the $9,198.32 claimant was paid during the period of October 13, 1990, through June 30, 1991, from the total amount of medical temporary total disability paid of $16,832.78 results in a figure of $7,634.46. Claimant was paid this amount at the weekly rate of $278.00 for 27.46 weeks. Neither claimant nor respondent has raised any issue as to the appropriateness of the number of weeks claimant was paid medical temporary total disability compensation. Should it, therefore, be the finding by the Appeals Board that 75.03 weeks was the period for which medical temporary total disability compensation should be ordered paid to

claimant by respondent, then at the maximum temporary total disability rate of $278.00 per week for 75.03 weeks for a total of $20,858.34 there would be an underpayment of $4,025.56.

Of the $15,012.00 respondent paid in vocational temporary total disability benefits, we do not know how much was paid during the periods of assessments as opposed to that which was paid during periods of plan implementations. We do know that at the rate of $278.00 per week, this sum represents a total of 54 weeks of temporary total disability compensation. The Appeals Board agrees with the respondent that claimant is limited to 72 weeks of temporary total disability compensation, but only when those payments were made pursuant to the implementation of a vocational rehabilitation plan. The weeks of temporary total disability paid during assessments would not be deducted. In this case, it is not clear how many of the 54 weeks claimant was paid in vocational temporary total disability were paid during assessments as opposed to the number of weeks paid during implementation of a vocational rehabilitation plan. For purposes of this Award we could apply all 54 weeks of vocational temporary total disability against the 72-week maximum. If we did so, claimant would be entitled to only an additional 18 weeks of temporary total disability compensation for the time he was attending school. However, during oral argument, respondent stated that claimant was awarded 20 weeks of temporary total disability during a vocational plan which called for job placement. Claimant's counsel, on the other hand, contended that claimant was paid only 16 weeks of temporary total disability during the job placement plan and that the remaining weeks of vocational temporary total disability were paid during the assessment process. This would mean that of the 54 weeks claimant was paid vocational temporary total disability compensation, 38 of those weeks were paid during periods of assessment. If this is correct, then temporary total disability compensation would be available during all 54 weeks of claimant's schooling.

Claimant testified that he started at the vocational technical school on January 19, 1993, and would finish February 14, 1994, a period of 56 weeks. However, he was to begin working February 1, 1994. Therefore, he would only be entitled to temporary total disability compensation for 54 weeks of the school program. The 75.03 weeks of medical temporary total disability plus the 108 weeks of vocational temporary total disability total 183.03 weeks. However, the period of time from the day following date of accident of October 12, 1990, until the date claimant returned to work on February 1, 1994, is only 172.57 weeks. Therefore, we will use the 172.57-week figure to calculate the award.

Our review of the record reveals two vocational rehabilitation plans calling for job placement services. The original vocational plan is dated February 24, 1992, and services ran for eight weeks. A Plan Amendment dated June 18, 1992, called for an additional eight weeks of job placement services. Therefore, it appears that claimant's counsel's position is correct. The Appeals Board finds only 16 weeks of temporary total disability compensation was paid pursuant to a vocational rehabilitation plan. Accordingly, all of the 54 weeks claimant was in school can be allowed under the 72-week maximum for vocational temporary total disability compensation.

Neither of the parties nor the Administrative Law Judge mentioned the provision of K.S.A. 1990 Supp. 44-510g(g) which provides that those weeks of temporary total disability

compensation which are paid during any period of vocational rehabilitation are not to be deducted from the 415 weeks of benefits, subject to a maximum of 26 weeks. The Appeals Board will enter its award consistent with this provision. Accordingly, claimant is entitled to a total of 441 weeks of combined temporary total disability and permanent partial disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward, dated January 18, 1995, should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Charles L. Abrams, and against the respondent, Joe Conroy Contractor, Inc., and its insurance carrier, Aetna Casualty & Surety Co., for an accidental injury which occurred October 12, 1990, and based upon an average weekly wage of $544.62 until July 1, 1991, and $575.50 thereafter, for 172.57 weeks of temporary total disability compensation at the rate of $278.00 per week or $47,974.46, followed by 268.43 weeks at the rate of $124.70 per week or $33,473.22 for a 32.5% permanent partial general body impairment of function, making a total award of $81,447.68.

As of September 13, 1996, there is due and owing claimant 172.57 weeks of temporary total disability compensation at the rate of $278.00 per week or $47,974.46, followed by 136.43 weeks of permanent partial disability compensation at the rate of $124.70 per week in the sum of $17,012.82, for a total of $64,987.28 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $16,460.40 is to be paid for 132 weeks at the rate of $124.70 per week, until fully paid or further order of the Director.

All other orders of the Administrative Law Judge are hereby approved and adopted by the Appeals Board to the extent they are not inconsistent with the findings, conclusions and orders contained herein.

IT IS SO ORDERED.

Dated this ____ day of September, 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Gregory D. Worth, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director